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A

Zainab bt Ibrahim v Limah bt Che Mat

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02-2145 OF 2011
ABDUL WAHAB PATAIL, ROHANA YUSUF AND TENGKU MAIMUN JJCA
15 APRIL 2014

C

Land Law — Trusts — Trust of land alleged — Land dispute — Land previously registered under name of another — Plaintiff lived on land upon invitation of father-in-law — Plaintiff built house on part of land set aside by father-in-law — Father-in-law transferred land to children — One of children
D *sold to another person — Subdivision plan with idea of transferring part of plaintiff's land to defendant — Land not transferred to defendant — Whether plaintiff was holding land in trust*

The appellant ('the plaintiff') had commenced an action against the
E respondent ('the defendant') in respect of a land registered in the latter's name. The land, previously known as Lot 2982, was registered in the name of the plaintiff's father-in-law ('Wan Ahmad'). Upon invitation of the plaintiff's father-in-law, the plaintiff and family lived on that land since 1976. The house occupied by the plaintiff was built on part of the land set aside by Wan Ahmad
F as her permanent residence. In 1985, Wan Ahmad transferred the land to his children Wan Mahmud and Wan Som. In 1995, Wan Mahmud sold the whole of the land to Wan Jaafar. In 1999, Wan Jaafar sold the land to the defendant. The defendant prepared a subdivision plan shown to the plaintiff with a view to transferring to the latter her portion. The subdivision was approved and two
G separate documents of title were issued. The lands were next known as Lot PT 167, HSM 4425, and PT 168, HSM 4426 Mukim Padang Embon, Pasir Mas, Kelantan. The plaintiff's land was located on PT 167. However, the defendant failed to transfer to the plaintiff the latter's part of the land. In an action in the High Court, it was held that although the plaintiff claimed all the proprietors
H held the land in trust for the plaintiff, the plaintiff failed to adduce any evidence; and that the plaintiff's version was that the defendant knew Wan Jaafar held the land in trust for the plaintiff, but the defendant denied this and bought the whole land after Wan Jaafar agreed to give vacant possession of the part occupied by the plaintiff. Since the versions contradicted each other, the
I High Court considered other evidence as a whole, including their actions to determine which version is more probable. To the High Court, it was very inappropriate for a person claiming a right to remain silent for 22 years. For this reason, the High Court concluded that the claim the defendant held the property in trust was an afterthought. Hence, the present appeal.

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Held, allowing the appeal:

(1) A trust would not arise by written document alone. It might arise orally or may be inferred from the conduct of the parties. This would be particularly so of a constructive trust. A party would be entitled to rely upon a trust being honoured. It was not disputed, that the plaintiff had remained on the land at all times (see para 11).

(2) The plaintiff's version was that the previous registered owners had held that part of the land occupied by her in trust for her. The trust was oral. Lack of documentary proof was inherent, particularly when there was no dispute necessitating any written communication to put objections on record. Given subdivision requires application, survey and would incur costs, it was not inconceivable that the plaintiff relied upon the trust. Indeed, so long as the trust is honoured, there was no need to undertake any action to defend her rights. The fact that the defendant, having bought the land, proceeded to subdivide the land, showing to the plaintiff the plan as to the portion occupied by the plaintiff, was not inconsistent with the right claimed by the plaintiff. There was no need, therefore, for the plaintiff to undertake any action to assert and defend her rights. That necessity arose only when the defendant sought to transfer the part occupied by the plaintiff to her own son, Zakaria (see para 12).

(3) In these circumstances, the reasoning that the plaintiff was indolent, and that her actions, or more precisely her non-actions, were inconsistent with her claim, was flawed. Since the need to undertake litigation to enforce her right arose only when the defendant sought to recover the land to give to her son, no adverse inference ought to have been drawn against her for not enforcing her claim earlier. Nor should it be taken against the plaintiff as inappropriate to have remained silent for 22 years, particularly in the face of the fact she was at all times in occupation without disturbance by the registered proprietors (see para 13).

(4) The fact that the plaintiff was at all times in occupation in quiet enjoyment of the part of the land she occupied was not inconsistent with her version that the registered proprietors accepted they held that part of the land in trust for her. The fact that the defendant, having purchased the land, proceeded to make a subdivision to separate that part of the land occupied by the plaintiff tends to support the plaintiff's version. This appears more so since there was no evidence adduced by the defendant to seek to remove the plaintiff before undertaking the subdivision. Since the land sold to the defendant was under one title it was not unnatural to have transferred the title to the defendant. The issue was simply whether the entire land in the title, including that part occupied by the plaintiff, was sold to the defendant. The defendant's version that Wan Jaafar agreed to sell the whole of the land to the defendant was of little assistance to the

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defendant's explanation because obviously he knew that the plaintiff was in occupation, and it was not in evidence that he had addressed the issue with the plaintiff (see para 14).

[Bahasa Malaysia summary

Perayu ('plaintif') telah memulakan satu tindakan terhadap responden ('defendan') bagi tanah yang didaftarkan di bawah nama defendan. Tanah tersebut, sebelum ini dikenali sebagai Lot 2982, didaftarkan di bawah nama bapa mertua plaintif ('Wan Ahmad'). Dengan pelawaan bapa mertua plaintif, plaintif dan keluarganya tinggal di atas tanah tersebut sejak 1976. Rumah yang dihuni oleh plaintif dibina atas bahagian tanah yang diketepikan oleh Wan Ahmad sebagai rumah tetapnya. Pada tahun 1985, Wan Ahmad memindah milik tanah tersebut kepada anak-anaknya Wan Mahmud dan Wan Som. Pada tahun 1995, Wan Mahmud menjual keseluruhan tanah tersebut kepada Wan Jaafar. Pada tahun 1999, Wan Jaafar menjual tanah tersebut kepada defendan. Defendan menyiapkan satu pelan pemecahan tanah yang ditunjukkan kepada plaintif dengan niat untuk memindah milik bahagian tanah tersebut kepada plaintif. Pemecahan tanah diluluskan dan dua dokumen hakmilik dikeluarkan. Tanah-tanah tersebut kemudiannya dikenali sebagai Lot PT 167, HSM 4425 dan PT 168, HSM 4426 Mukim Padang Embon, Pasir Mas, Kelantan. Tanah plaintif terletak di PT 167. Walau bagaimanapun, defendan gagal memindah milik kepada plaintif bahagian tanahnya. Dalam tindakan di Mahkamah Tinggi, diputuskan bahawa walaupun plaintif mendakwa kesemua pemilik memegang tanah tersebut sebagai amanah bagi plaintif, plaintif gagal mengemukakan sebarang keterangan; dan bahawa versi plaintif yang defendan mengetahui bahawa Wan Jaafar memegang tanah tersebut sebagai amanah bagi plaintif tetapi defendan menafikan ini dan membeli keseluruhan tanah selepas Wan Jaafar bersetuju untuk memberi milikan kosong bagi bahagian yang diduduki oleh plaintif. Memandangkan versi-versi bercanggah dengan satu sama lain, Mahkamah Tinggi mempertimbangkan keterangan lain dengan menyeluruh, termasuk tindakan-tindakan untuk menentukan versi yang mana lebih berkemungkinan. Bagi Mahkamah Tinggi, adalah tidak wajar bagi seseorang yang menuntut haknya untuk diam selama 22 tahun. Atas sebab ini, Mahkamah Tinggi memutuskan bahawa tuntutan defendant memegang hartanah tersebut sebagai amanah adalah satu fikiran semula. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Satu amanah tidak akan berbangkit daripada dokumen bertulis semata-mata. Ia mungkin berbangkit atau boleh disimpulkan daripada tindakan pihak-pihak. Ini mungkin berlaku dalam satu amanah konstruktif. Satu-satu pihak itu berhak untuk bersandarkan pada amanah yang dilunaskan. Tidak dipertikaikan, bahawa plaintif kekal atas tanah tersebut pada setiap masa (lihat perenggan 11).

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(2) Versi plaintif bahawa pemilik-pemilik berdaftar sebelum ini telah memegang bahagian tanah yang diduduki olehnya sebagai amanah buatnya. Amanah tersebut berbentuk lisan. Ketiadaan keterangan dokumentar adalah inheren, khasnya apabila tiada pertikaian yang mewajarkan komunikasi bertulis untuk membuktikan bantahan. Memandangankan pemecahan memerlukan permohonan, pengukuran dan akan mengeluarkan kos, tidak boleh diterima bahawa plaintif bergantung pada amanah. Malahan, asalkan amanah tersebut dilunaskan, tiada keperluan untuk mengambil sebarang tindakan untuk membela hak-haknya. Fakta bahawa defendan, setelah membeli tanah tersebut, meneruskan untuk memecahkan tanah, menunjukkan pelan kepada plaintif bahagian yang dihuni oleh plaintif adalah tidak selaras dengan hak yang dituntut oleh plaintif. Tiada keperluan, oleh itu, untuk plaintif mengambil sebarang tindakan untuk menegakkan dan membela hak-haknya. Keperluan tersebut timbul hanya apabila defendan memohon untuk memindah milik bahagian yang diduduki oleh plaintif kepada anaknya sendiri, Zakaria (lihat perenggan 12).

(3) Dalam hal keadaan ini, sebab-sebab bahawa plaintif malas, dan bahawa tindakannya atau lebih tepat lagi, ketiadaan tindakan-tindakan, adalah selaras dengan tuntutannya, yang cacat. Oleh kerana keperluan untuk litigasi untuk menguatkuasakan haknya hanya berbangkit apabila defendan memohon untuk mendapatkan semula tanah untuk diberikan kepada anak lelakinya, tiada kesimpulan anggapan bertentangan yang harus diambil terhadapnya kerana tidak menguatkuasakan tuntutannya dengan lebih awal. Ia juga tidak patut dikatakan bahawa tidak wajar bagi plaintif kekal berdiam selama 22 tahun, khasnya dalam fakta bahawa dia, pada setiap masa, menghuni tanpa sebarang gangguan oleh pemilik-pemilik berdaftar (lihat perenggan 13).

(4) Fakta bahawa plaintif, pada setiap masa menduduki dengan nikmat bahagian tanah yang didudukinya adalah tidak selaras dengan versi bahawa pemilik-pemilik berdaftar menerima yang mereka memegang bahagian tanah tersebut sebagai amanah buatnya. Fakta bahawa defendan, setelah membeli tanah tersebut, meneruskan untuk membuat pemecahan untuk membahagikan bahagian tanah yang diduduki oleh plaintif lebih berkemungkinan menyokong versi plaintif. Ia kelihatan lebih jelas memandangkan tiada keterangan yang dikemukakan oleh defendan untuk memohon untuk menyingkirkan plaintiff sebelum mengaku janji pemecahan. Oleh kerana tanah yang dijual kepada defendan adalah di bawah satu hakmilik, bukan tidak semulajadi untuk memindah hakmilik kepada defendan. Isunya adalah sama ada keseluruhan tanah dalam hakmilik, termasuk bahagian yang diduduki oleh plaintif, dijual kepada defendan. Versi defendan bahawa Wan Jaafar bersetuju untuk menjual keseluruhan tanah kepada defendan tidak membantu penjelasan defendan kerana jelas yang dia mengetahui

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bahawa plaintif sedang mendudukinya dan tidak ada dalam keterangan bahawa dia telah mengajukan isu tersebut kepada plaintif (lihat perenggan 14).]

Appeal from: Civil Suit No 22–47 of 2007 (High Court, Kota Bharu)

Wan Jawahir bt Harun (Wan Jawahir & Co) for the appellant.
Wan Abdullah Thani bin Wan Yusof (Roshamshul & Zulfikar) for the respondent.

Abdul Wahab Patail JCA:

[1] Having heard counsel for the parties on their submissions, we allowed the appeal with costs fixed at RM15,000 and ordered that the deposit be refunded.

BACKGROUND

[2] The appellant/plaintiff Zainab bt Ibrahim ('the plaintiff') had commenced an action to seek the following reliefs against the respondent/defendant Limah bt Che Mat ('the defendant') in respect of the land registered in the latter's name:

(a) Pengisytiharan bahawa Defendan memegang tanah yang dikenali sebagai Tanah Lot PT 167, HSM 4425, Mukim Padang Embon, Pasir Mas, Kelantan sebagai Pemegang Amanah Biasa ('bare trustee') kepada Plaintif;

(b) Kesemua bahagian tanah Tanah Lot PT 167, HSM 4425, Mukim Padang Embon, Pasir Mas, Kelantan diletak hak kepada Plaintif untuk didaftarkan secara sah kepada Plaintif;

(c) Pentadbir Tanah Jajahan Pasir Mas Kelantan membatalkan nama LIMAH BINTI CHE MAT sebagai pemilik berdaftar kesemua bahagian Tanah Lot PT 167, HSM 4425, Mukim Padang Embon, Pasir Mas, Kelantan;

(d) Pentadbir Tanah Jajahan Pasir Mas, Kelantan mendaftarkan kesemua bahagian Tanah Lot PT 167, HSM 4425, Mukim Padang Embon, Pasir Mas, Kelantan kepada Plaintif, ZAINAB BINTI IBRAHIM sebagai pemilik berdaftar bagi menggantikan nama LIMAH BINTI CHE AMAT;

(e) Defendan membayar gantirugi sebagaimana gang ditaksirkan;

(f) Faedah keatas gantirugi;

(g) Kos; dan

(h) Lain-lain Perintah atau arahan yang difikirkan patut oleh Mahkamah Yang Mulia.

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[3] The case for the plaintiff in the High Court may be summarised briefly as follows:

(a) the land, previously known as Lot 2982, Mukim Padang Embon, Pasir Mas, Kelantan was registered in the name of the plaintiff's father-in-law, Wan Ahmad bin Wan Jenal and who lived on the land all his life;

(b) upon invitation of the plaintiffs father-in-law, the plaintiff and family lived on that land since 1976;

(c) the house occupied by the plaintiff was built on part of the land set aside by Wan Ahmad bin Wan Jenal as her permanent residence;

(d) in 1985, Wan Ahmad bin Wan Jenal transferred the land to his children Wan Mahmud and Wan Som;

(e) in 1995, Wan Mahmud sold the whole of the land to Wan Jaafar bin Wan Mahmud;

(f) in 1999, Wan Jaafar bin Wan Mahmud sold the land to the defendant;

(g) the defendant prepared a subdivision plan shown to the plaintiff with a view to transferring to the latter her portion;

(h) the subdivision was approved and two separate documents of title were issued on 22 August 2002, for the lands now known as:

(i) Lot PT 167, HSM 4425; and

(ii) PT 168, HSM 4426 Mukim Padang Embon, Pasir Mas, Kelantan,

(i) the plaintiffs land is located on PT 167; and

(j) but the defendant failed to transfer to the plaintiff the latter's part of the land.

[4] In its grounds of judgment, the High Court set out the case for the plaintiff, the case for the defendant, and the issues before it before proceeding to make its findings and decision.

[5] The issues were summed up at para 6 of its grounds by the High Court as follows:

(a) *adakah pemilik terdahulu tanah tersebut memegang tanah tersebut atas amanah kepada plaintif?*

(b) *adakah defendan mengetahui bahawa pemilik sebelum beliau/terdahulu memegang tanah itu atas amanah kepada plaintif?*

(c) *adakah defendan berjanji untuk memindah milik Lot 167 kepada plaintif?* and

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(d) *adakah plaintif telah membuktikan tuntutan beliau?*

[6] These issues were addressed in two parts as follows.

[7] In the first part, the reasoning may be summarised as follows:

(a) though the plaintiff claimed all the proprietors held the land in trust for the plaintiff, the plaintiff failed to adduce any evidence;

(b) the witnesses called by the plaintiff failed to give credible evidence, that much of their evidence is hearsay, whereas the defendant submitted documentary evidence which the High Court found to be inherently probable;

(c) indolence of the plaintiff in failing to take steps to have title in her name is inconsistent with actions of a person claiming a right to the land;

(d) the defendant bought the land in 1999 and the plaintiff commenced action only in 2007 after the defendant sought to recover the land occupied by the plaintiff to give to the defendant's son Zakaria; and

(e) if what is claimed by the plaintiff is true, the plaintiff would have taken action sooner, and the High Court was amazed the plaintiff waited 22 years.

[8] In the second part, the High Court reasoned as follows:

(a) the plaintiff's version is that the defendant knew Wan Jaafar held the land in trust for the plaintiff, but the defendant denied this and bought the whole land after Wan Jaafar agreed to give vacant possession of the part occupied by the plaintiff;

(b) since the versions contradicted each other, the High Court considered other evidence as a whole, including their actions to determine which version is more probable;

(c) the plaintiff's actions is inconsistent with her claim, not having taken any action since 1985 against Wan Mahmud and Wan Som, or against Wan Jaafar since 1995 or the defendant since 1999 even though she knew the whole of the land was transferred;

(d) to the High Court, it was very inappropriate for a person claiming a right to remain silent for 22 years. For this reason, the High Court concluded that the claim the defendant held the property in trust is an afterthought;

(e) the plaintiff's action of doing nothing for 22 years speaks louder than words, and her oral testimony to support her claim is without merit; and

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(f) 'Atas alasan itu saya mendapati, atas imbangan kebarangkalian Plaintif gagal membuktikan tuntutan beliau dan dengan itu, tuntutan ditolak dengan kos'.

OBSERVATION AND REASONING

[9] If the law is just in that the burden of proof lies upon a person making a claim, it is also fair that that burden is to prove upon a balance of probabilities. Having put the facts, and where disputed the evidence, produced by each of the parties upon that balance of probabilities, a plaintiff is held to have proved its case upon a balance of probabilities if the balance tilts in his favour. It is also trite that it is not so much the number of facts and evidence, but the weight accorded by the appreciation of the facts and evidence that determines in which direction the balance of probabilities tilt.

[10] An appellate court is loath to interfere with findings of fact where the finding rests upon an assessment of credibility, where the trial court exercises the audio visual advantage that it has over an appellate court. However, the reasoning applied to those facts to arrive at findings and conclusions is subject to the same scrutiny as application of law to the facts of the case in order to arrive at a conclusion and decision. In such a case, the examination conducted by an appellate court is as to the logic of the reasoning.

[11] We bear in mind that a trust does not arise by written document alone. It may arise orally or may be inferred from the conduct of the parties. This is particularly so of a constructive trust. We bear in mind also that a party is entitled to rely upon a trust being honoured. It is not disputed, in this case, that the plaintiff had remained on the land at all times.

[12] The plaintiff's version is that the previous registered owners had held that part of the land occupied by her in trust for her. The trust is oral. Lack of documentary proof is inherent, particularly when there is no dispute necessitating any written communication to put objections on record. Given subdivision requires application, survey and would incur costs, it is not inconceivable that the plaintiff relies upon the trust. Indeed, so long as the trust is honoured, there was no need to undertake any action to defend her rights. The fact that the defendant, having bought the land, proceeded to subdivide the land, showing to the plaintiff the plan as to the portion occupied by the plaintiff, is not inconsistent with the right claimed by the plaintiff. There was no need, therefore, for the plaintiff to undertake any action to assert and defend her rights. That necessity arose only when the defendant sought to transfer the part occupied by the plaintiff to her own son, Zakaria.

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[13] In these circumstances, the reasoning that the plaintiff was indolent, and that her actions, or more precisely her non-actions, were inconsistent with her claim, is flawed. We hold that since the need to undertake litigation to enforce her right arose only when the defendant sought to recover the land to give to her son, no adverse inference ought to have been drawn against her for not enforcing her claim earlier. Nor should it be taken against the plaintiff as inappropriate to have remained silent for 22 years, particularly in the face of the fact she was at all times in occupation without disturbance by the registered proprietors.

[14] We concluded with an examination of in which direction the balance of probabilities tilt. The fact that the plaintiff was at all times in occupation and quite enjoyment of the part of the land she occupied is not inconsistent with her version that the registered proprietors accepted they held that part of the land in trust for her. The fact that the defendant, having purchased the land, proceeded to make a subdivision to separate that part of the land occupied by the plaintiff tends, in our view, to support the plaintiff's version. This appears more so since there is no evidence adduced by the defendant to seek to remove the plaintiff before undertaking the subdivision. Since the land sold to the defendant was under one title, it is, in our view, not unnatural to have transferred the title to the defendant. The issue is simply whether the entire land in the title, including that part occupied by the plaintiff, was sold to the defendant. The defendant's version that Wan Jaafar bin Wan Mahmud agreed to sell the whole of the land to the defendant, is of little assistance to the defendant's explanation because obviously he knew that the plaintiff was in occupation, and it is not in evidence that he had addressed the issue with the plaintiff.

[15] It is clear that the balance of probabilities point in the direction of the plaintiff, and accordingly, we allowed the plaintiff's appeal as set out in para [1] above.

Appeal allowed.

Reported by Afiq Mohamad Noor